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No. 01-1120

In the Supreme Court of the United States

DAVID MEYER, INDIVIDUALLY AND IN HIS CAPACITY AS PRESIDENT AND DESIGNATED OFFICER/BROKER OF TRIAD, INC., ETC., PETITIONER

v.

EMMA MARY ELLEN HOLLEY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING AFFIRMANCE

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QUESTIONS PRESENTED

The brief for the United States will address the following questions:

1. Whether the Fair Housing Act, 42 U.S.C. 3601 *et seq.*, and implementing regulations promulgated by the Department of Housing and Urban Development, establish broader rules of vicarious liability than would apply under general principles of agency and corporate law.

2. Whether the court of appeals' judgment in this case, which reversed the district court's dismissal of respondents' suit and remanded the case for further proceedings, should be affirmed.

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INTEREST OF THE UNITED STATES

The Fair Housing Act (FHA), 42 U.S.C. 3601 *et seq.*, prohibits discrimination in housing on the basis of race, color, religion, sex, disability, familial status, and national origin. The Department of Housing and Urban Development (HUD) conducts administrative hearings in FHA cases and has promulgated regulations implementing the Act. In resolving the question of vicarious liability presented in this case, the court of appeals relied in part on former 24 C.F.R. 103.20 (1999), a HUD regulation in effect at the time of the discriminatory conduct alleged here, which defined the class of persons against whom administrative complaints to enforce the FHA could properly be filed. The substance of that regulation is retained in current 24 C.F.R. 103.202. In addition, the Attorney General is authorized to file suit to enforce the FHA when, *inter alia*, he concludes that a

"pattern or practice" of violations exists. 42 U.S.C. 3614. In light of the responsibilities exercised by HUD and the Department of Justice for implementation of the FHA, and the court of appeals' reliance on HUD's regulations, the United States has a substantial interest in the question presented here.

STATEMENT

1. The Fair Housing Act (FHA), 42 U.S.C. 3601 *et seq.*, makes it unlawful "[t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin." 42 U.S.C. 3604(b). The Act further provides that "[i]t shall be unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin." 42 U.S.C. 3605(a). The FHA defines the term "person" to include "one or more individuals, corporations, partnerships, associations, labor organizations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under title 11, receivers, and fiduciaries." 42 U.S.C. 3602(d).

The FHA may be enforced either through the filing of an administrative complaint with HUD, or through a civil action in federal court. See 42 U.S.C. 3610-3614.[1] At the time

[1] Civil actions to enforce the FHA may be filed either by a private person who is aggrieved by a violation, 42 U.S.C. 3613, or by the Attorney General when, *inter alia*, he has reason to believe that a "pattern or practice" of violations exists, 42 U.S.C. 3614.

of the discriminatory acts alleged in this case, HUD regulations provided the following guidance regarding the filing of an administrative complaint:

> (a) A complaint [under the FHA] may be filed [with HUD] against any person alleged to be engaged, to have engaged, or to be about to engage, in a discriminatory housing practice.
>
> (b) A complaint may also be filed against any person who directs or controls, or has the right to direct or control, the conduct of another person with respect to any aspect of the sale * * * of dwellings * * * if that other person, acting within the scope of his or her authority as employee or agent of the directing or controlling person, is engaged, has engaged, or is about to engage, in a discriminatory housing practice.

24 C.F.R. 103.20 (1999). In 1999, HUD revised its regulations pertaining to administrative complaints. 64 Fed. Reg. 18,538. Under the regulations in their current form, notice that a complaint has been filed must be served on "any person who directs or controls, or who has the right to direct or control, the conduct of another person who is involved in a fair housing complaint." 24 C.F.R. 103.202(b).

2. The plaintiffs in this case (respondents in this Court) are Emma Mary Ellen Holley, an African-American woman; David Holley, a Caucasian man; their son, Michael Holley; and Brooks Bauer, a builder. The complaint alleges that in October 1996, the Holleys visited the Twenty-Nine Palms, California, office of Triad, Inc. (Triad), an incorporated real estate firm.[2] The Holleys met with a Triad salesperson, Grove Crank, and asked about listings for new houses in the

[2] Because the district court granted petitioner's motion for summary judgment, the facts must be construed in the light most favorable to respondents.

price range of $100,000 to $150,000. Crank showed them four houses, each priced at more than $150,000. The next month, the Holleys identified a home that happened to be listed by Triad. A different Triad salesperson, Terry Stump, informed the Holleys that the house was listed for $145,000. The Holleys offered to pay the asking price and to put $5000 in escrow for the builder to hold the house until April or May of 1997, when they were to close escrow on the sale of their current home. When Ms. Holley called the builder (Bauer), he told her that the offer seemed fair, but that it should go through Triad. Pet. App. 2-3.

Stump subsequently called the Holleys and told them that more experienced agents in Triad's office, one of whom was later identified as Crank, felt that $5000 was insufficient to induce the builder to hold the house for six months. The Holleys decided not to raise the offer, and Triad never formally presented the offer to Bauer. One week later, Bauer stopped by Triad's office and asked Crank about the status of the Holleys' offer. Crank thereupon used racially derogatory language in referring to the Holleys and told Bauer that he did not want to deal with them. The Holleys eventually hired a builder to construct a house for them, and Bauer later sold his house for approximately $20,000 less than the Holleys had offered. Pet. App. 3.

California law provides that a corporation may not engage in acts for which a real estate license is required unless the corporation has designated one of its officers to serve as the licensed officer/broker of the company. Pet. App. 12-13. "Under California law, a real estate broker is required to exercise reasonable supervision over the activities of his or her salespersons, including familiarizing salespersons with the requirements of federal and state laws relating to the prohibition of discrimination." *Id.* at 12. At the time of the alleged acts of discrimination in this case, petitioner David Meyer was the designated officer/broker of Triad, as well as

the company's president. See *id.* at 6. From 1978 until 1995, petitioner was also Triad's sole shareholder; his ownership of the company since that time is disputed. See *id.* at 9-10 n.4.

3. On November 14, 1997, respondents filed suit against Crank and Triad, asserting a variety of federal and state claims. They later filed a separate action against petitioner, and the district court consolidated the two cases. The court subsequently dismissed as time-barred all claims except the FHA claim. Pet. App. 3-4, 31-32.

With regard to the FHA claim, the district court denied petitioner's motion to dismiss. Pet. App. 22-25. The court found that petitioner's status as an officer of Triad provided no valid basis for holding him personally liable, stating that "any liability against [petitioner] as an officer of Triad would only attach to Triad in that [respondents] have not urged theories that could justify reaching [petitioner] individually." *Id.* at 23. The court held, however, that petitioner's status as designated broker of Triad might provide a basis for imposing personal liability upon him, and that respondents could recover from petitioner individually if they could prove that an FHA violation had been committed by an employee operating under a broker's license held by petitioner as an individual rather than as a corporate officer. *Id.* at 24-25.

The district court subsequently granted petitioner's motion for summary judgment on the FHA claim. Pet. App. 29-36. The court stated that "[a] licensed broker under whose license employees operate may be liable for the discriminatory actions of those employees." *Id.* at 33. The court held, however, that

> where the license is held by a corporation, the liability attaches to the corporation and not to the officers of the corporation who did not engage in discriminatory conduct. Therefore, the sole issue in this summary judgment motion is whether [petitioner] holds his broker's license as an individual or as an officer of Triad, Inc.

Id. at 34.

The district court explained that "[i]n California, both corporations and individuals have to be licensed to operate as real estate brokers. If the licensee is a corporation, the license entitles one officer from the corporation to act as a real estate broker for the corporation and he must be designated as such on the license." Pet. App. 35-36. The court concluded that because in this case "the real estate license was issued to Triad, Inc. with [petitioner] as the designated corporate officer of Triad, Inc. * * *, Crank's discriminatory acts are imputed to Triad, Inc. and not to [petitioner] as an individual. Hence [petitioner] cannot be held personally liable for Crank's alleged misconduct." *Id.* at 36.

The district court certified its judgment with respect to petitioner for immediate appeal pursuant to Federal Rule of Civil Procedure 54(b). Respondents' FHA claims against Triad and Crank remain pending in the district court. See Pet. App. 4.

4. The Court of Appeals for the Ninth Circuit reversed the district court's grant of summary judgment and remanded the case for further proceedings. Pet. App. 1-16. The court stated that, "[a]lthough under general principles of tort law corporate shareholders and officers usually are not held vicariously liable for an employee's action, the criteria for the Fair Housing Act [are] different." *Id.* at 2. The thrust of the court's reasoning was as follows:

> Although officers and shareholders of a corporation generally enjoy immunity from liability for corporate acts, as a matter of furthering the compelling policy of the FHA and because this involves a non delegable duty, we conclude that a corporation and its officers may be held liable for their failure to ensure the corporation's compliance with the FHA, whether or not the officers directed or authorized the particular discriminatory acts

> that occurred. * * * * The overriding societal priority of the FHA indicates that the owner has the power to control the acts of the agent and so must act to compensate the injured party and to ensure that similar harm will not occur again. When one of two innocent people must suffer, the one whose acts permitted the wrong to occur is the one to bear the burden.

Id. at 6-7 (footnote omitted). The court also relied in part on 24 C.F.R. 103.20 (1999), stating that petitioner's "undisputed responsibility to supervise Triad's salespersons in real estate transactions places him squarely within HUD's regulatory history allowing complaints against any person who has the right to direct or control the conduct of another in any aspect of the sale of or provision of brokerage services to the sale of a dwelling." Pet. App. 14.

SUMMARY OF ARGUMENT

I. A. Under the FHA and HUD's implementing regulations, questions of vicarious liability are resolved by application of general agency and corporate law principles. Under those principles, a master is vicariously liable for torts committed by his servants within the scope of their employment, as well as for torts committed outside the scope of employment when the servant is aided in the commission of the tort by the existence of the agency relation. The principal is liable in that setting regardless of whether he knew of or intended the wrongful conduct or was negligent in preventing it from occurring. While a corporation generally is a potentially liable "master" under those principles, an individual corporate officer or supervisor is not. A typical officer or supervisor does not stand in a principal-agent relationship to subordinate employees and is therefore not generally subject to vicarious liability.

B. Neither the FHA, nor HUD's implementing regulations, reflect an intent to depart from general agency and

corporate law principles in resolving questions of vicarious liability for violations of the Act. The text of the Act does not articulate distinct standards for determining the scope of vicarious liability, nor does it suggest that background agency principles should be disregarded. The most natural inference is that courts in FHA cases should follow generally applicable rules of agency and corporate law. That is the approach this Court has taken in resolving questions of vicarious liability under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* In deviating from traditional agency principles, the court of appeals misinterpreted former 24 C.F.R. 103.20(b) (1999), a HUD regulation governing administrative complaint proceedings. Both the text of that rule, and the agency's contemporaneous explanation of its own regulation, make clear that HUD intended to incorporate, rather than to depart from, generally applicable agency principles.

II. Although the court of appeals erred in finding traditional agency principles inapplicable to the FHA, the judgment of the court of appeals, reversing the district court's dismissal of respondents' claims and remanding the case for further proceedings, should be affirmed. Under generally applicable principles of agency and corporate law, respondents should have an opportunity to establish that petitioner is subject to personal liability under corporate veil-piercing principles. Under federal common-law principles, a court in determining whether to pierce the corporate veil considers whether a unity of interests exists between the corporation and the individual shareholder, whether corporate formalities have been disregarded, and whether limited shareholder liability would lead to inequitable results.

Respondents have alleged that petitioner was Triad's sole shareholder at the time of Crank's discriminatory conduct. Taken together with petitioner's roles as Triad's president

and designated officer/broker, his status as sole shareholder (if proved) would suggest that petitioner exercised pervasive control over the corporation's affairs. Respondents may also be able to demonstrate that petitioner ignored corporate formalities. Finally, because Triad appears to be without assets, piercing of the corporate veil may be necessary to prevent inequitable results. That is particularly so in light of respondents' allegation that petitioner negligently performed his responsibilities as Triad's designated officer/broker.

ARGUMENT

I. UNDER THE FHA AND HUD'S IMPLEMENTING REGULATIONS, QUESTIONS OF VICARIOUS LIABILITY ARE RESOLVED BY APPLICATION OF GENERAL AGENCY AND CORPORATE LAW PRINCIPLES

A. Under Established Principles, A Person's Actual Or Potential Control Over The Conduct Of A Subordinate May Give Rise To Liability, Without Regard To Personal Fault, For The Subordinate's Tortious Or Other Wrongful Conduct

Congress may establish specific rules for indirect liability under a particular statutory scheme. However, when, as here, Congress does not address the issue directly, general principles of agency and corporate law determine the scope of vicarious liability. Although those principles generally make the corporation itself liable for the unlawful acts of corporate employees, those principles generally shield corporate officers and supervisors from personal liability for the acts of subordinates.

1. Within broad limits, Congress may define the terms under which persons standing in a responsible relation to an actual violator of federal law will be subject to specified sanctions. For example, under the Food Stamp Act of 1977, 7 U.S.C. 2011 *et seq.*, and implementing regulations, a food

store can be permanently disqualified from participation in the food stamp program if its employees traffic in food stamp coupons, even where the store owner and manager have no knowledge of, and did not benefit from, the "trafficking" violation. See 7 U.S.C. 2021(b)(3)(B); 7 C.F.R. 278.6(e)(1)(i). The courts have repeatedly upheld the imposition of liability under this scheme, rejecting a variety of constitutional and other challenges. See, *e.g.*, *Traficanti* v. *United States*, 227 F.3d 170, 174-175 (4th Cir. 2000); *Kim* v. *United States*, 121 F.3d 1269, 1272-1275 (9th Cir. 1997); *Bakal Bros.* v. *United States*, 105 F.3d 1085, 1088-1090 (6th Cir. 1997); *TRM, Inc.* v. *United States*, 52 F.3d 941, 944-947 (11th Cir. 1995); *Freedman* v. *Department of Agric.*, 926 F.2d 252, 254-262 (3d Cir. 1991). If Congress has specified the circumstances under which persons other than the actual violator may be held liable for particular statutory breaches, there is no need to resort to general agency principles.

2. Even where Congress has not addressed the question directly with respect to a particular cause of action, it is a core principle of agency law that "[a] master is subject to liability for the torts of his servants committed while acting in the scope of their employment," as well as for torts committed outside the scope of employment where the servant "is aided in accomplishing the tort by the existence of the agency relation." Restatement (Second) of Agency § 219(1) and (2)(d) (1957). Liability under those principles does not ordinarily require proof that the employer knew of or intended the wrongful conduct, or that the employer was negligent in failing to prevent it from occurring. See, *e.g.*, *Burlington Indus., Inc.* v. *Ellerth*, 524 U.S. 742, 761 (1998) (explaining that "courts have consistently held employers liable for the discriminatory discharges of employees by supervisory personnel, whether or not the employer knew, or should have known, or approved of the supervisor's actions," and endorsing those holdings as correct applications of agency principles) (quoting *Meritor Sav. Bank, FSB* v. *Vinson*, 477 U.S. 57, 70-71 (1986)); *Cantrell* v. *Forest City Pub. Co.*, 419 U.S. 245, 253 (1974) (publisher was liable "under traditional doctrines of *respondeat superior*" for defamatory article written by employee within the scope of his employment, even though "there was no evidence that [the publisher] had knowledge of any of the inaccuracies contained in [the] article"); *Railroad Co.* v. *Hanning*, 82 U.S. (15 Wall.) 649, 657 (1872) ("The rule extracted from the cases is this: The principal is liable for the acts and negligence of the agent in the course of his employment, although he did not authorize or did not know of the acts complained of.").

3. In the corporate context, those principles generally make the corporation itself liable for the unlawful acts of corporate employees performed in the course of corporate duties. On the other hand, an individual corporate officer or supervisor is not subject to vicarious liability for torts committed by subordinate employees. See 3A *Fletcher Cyclopedia of Corporations*, § 1137, at 300 (1994) ("an officer who takes no part in the commission of the tort is not personally liable to third persons for the torts of other agents, officers or employees of the corporation"). The corporate entity constitutes the principal, and officers and supervisors are agents of the principal, as are the subordinate employees. See Restatement (Second) of Agency § 358, cmt. a (1957) ("The doctrine of respondeat superior does not apply to create liability against an agent for the conduct of servants and other agents of the principal appointed by him, even though other agents are subject to his orders in the execution of the principal's affairs."); *Rosenthal & Co.* v. *Commodity Futures Trading Comm'n*, 802 F.2d 963, 967 (7th Cir. 1986) (the doctrine of respondeat superior "is a doctrine about employers and * * * other principals. It has no application to a case where A, B's supervisor, is sued

because B commits a tort."); *Jones* v. *City of Chicago*, 856 F.2d 985, 992 (7th Cir. 1988) (citing cases).

The rule that an individual officer or supervisor is not liable for the torts of subordinates follows from the nature of the relationships among the employee, supervisor, and corporation. "Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." *General Bldg. Contractors Ass'n* v. *Pennsylvania*, 458 U.S. 375, 392 (1982) (quoting Restatement (Second) of Agency § 1 (1957)). An individual corporate officer or supervisor may have the authority to direct or control a subordinate employee, but the subordinate does not stand in a "fiduciary relation" to the officer or supervisor or act "on his behalf." Rather, the subordinate owes a duty of loyalty to the corporate employer itself rather than to any individual within the corporate hierarchy.

An individual officer or supervisor, however, still faces direct liability for the consequences of his own derelictions. Thus, a person who directs another to perform a tortious or otherwise wrongful act is generally liable for any resulting harm. See Restatement (Second) of Agency §§ 212, 344 (1957). That principle "is not dependent upon the law of agency but results from the general rule * * * that one causing and intending an act or result is as responsible as if he had personally performed the act or produced the result." *Id.* § 212 cmt. a.

Finally, although an officer or "a shareholder—even a single shareholder—is normally not liable for the torts of the corporations it holds," *Roe* v. *Sewell*, 128 F.3d 1098, 1103 (7th Cir. 1997); accord *United States* v. *Bestfoods*, 524 U.S. 51, 61-62 (1998), there is an important exception to principles of limited liability. It is a "fundamental principle of corporate law * * * that the corporate veil may be pierced and the

shareholder held liable for the corporation's conduct when, *inter alia*, the corporate form would otherwise be misused to accomplish certain wrongful purposes." *Bestfoods*, 524 U.S. at 62.

B. Neither The Text Of The FHA, Nor HUD's Implementing Regulations, Reflect An Intent To Depart From General Agency And Corporate Law Principles Governing Vicarious Liability

The court of appeals acknowledged in this case that "officers and shareholders of a corporation generally enjoy immunity from liability for corporate acts." Pet. App. 6. Relying on "the compelling policy of the FHA," however, the court nevertheless "conclude[d] that a corporation and its officers may be held liable for their failure to ensure the corporation's compliance with the FHA, whether or not the officers directed or authorized the particular discriminatory acts that occurred." *Ibid.* The court explained that "[t]he overriding societal priority of the FHA indicates that the owner has the power to control the acts of the agent and so must act to compensate the injured party and to ensure that similar harm will not occur again. When one of two innocent people must suffer, the one whose acts permitted the wrong to occur is the one to bear the burden." *Id.* at 7. The court of appeals also relied in part on former 24 C.F.R. 103.20 (1999), a HUD regulation, which the court construed to impose potential liability upon "any person who has the right to direct or control the conduct of another in any aspect of the sale of or provision of brokerage services to the sale of a dwelling." Pet. App. 14.

The thrust of the court of appeals' analysis was that, even if petitioner would not be vicariously liable for Crank's alleged misconduct under generally applicable agency and corporate law principles, a different and more expansive rule of vicarious liability applies under the FHA. See Pet. App. 2 ("Although under general principles of tort law corporate

shareholders and officers usually are not held vicariously liable for an employee's action, the criteria for the Fair Housing Act [are] different."). Neither the statutory text and purposes, nor HUD's regulatory scheme, supports that conclusion.

1. *The Text Of The FHA Does Not Reflect Any Deviation From General Principles Of Vicarious Liability.*

The court of appeals did not identify any provision of the FHA that manifests a congressional intent to depart from usual rules of corporate and agency law. The Act makes it unlawful "[t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin." 42 U.S.C. 3604(b). The Act further provides that "[i]t shall be unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin." 42 U.S.C. 3605(a). The FHA defines the term "person" to include "one or more individuals, corporations, partnerships, associations, labor organizations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under title 11, receivers, and fiduciaries." 42 U.S.C. 3602(d). The Act does not, however, specifically articulate the standards to be applied to determine whether a particular individual or other legal entity may be held accountable for a particular violation. Nor, more particularly, does the Act address the circumstances, if any, when one person may be individually liable for the violations of another.

Under background principles of agency, there is generally some scope for such indirect or vicarious liability. See pp. 10-11, *supra*. It is clear, for example, that Triad, as Crank's principal and employer, could be held liable for Crank's unlawful actions. The text of the FHA does not suggest that those background rules should be disregarded. Indeed, the language of the FHA expressly contemplates that principals will be held liable for their agents' actions in some circumstances. By including "corporations, partnerships, [and] associations," within the definition of "person[s]" prohibited from discriminating, Congress made clear that FHA liability may properly be imposed on artificial legal entities that are capable of acting *only through* the agency of others.

By the same token, however, nothing in the FHA suggests that courts should apply an unusually *expansive* conception of vicarious liability in resolving claims brought under the Act. "[A]gainst this venerable common-law backdrop, the congressional silence is audible." *Bestfoods*, 524 U.S. at 62. The most natural inference is that courts in FHA cases should be guided by generally applicable rules of agency and corporate law. Cf. *id.* at 63 ("the failure of the statute to speak to a matter as fundamental as the liability implications of corporate ownership demands application of the rule that in order to abrogate a common-law principle, the statute must speak directly to the question addressed by the common law") (brackets and internal quotation marks omitted).

The court of appeals found a special rule of vicarious liability to be justified by "[t]he overriding societal priority of the FHA." Pet. App. 7. Title VII of the Civil Rights Act of 1964 serves analogous purposes in the context of employment, however, and nonetheless this Court generally has relied on background agency principles in construing Title VII. See, *e.g.*, *Faragher* v. *Boca Raton*, 524 U.S. 775, 793-809 (1998); *Burlington Indus., Inc.* v. *Ellerth*, 524 U.S. 742, 754-

765 (1998); *Meritor Sav. Bank, FSB* v. *Vinson*, 477 U.S. 57, 72 (1986). The Court has recognized that occasional departures from background rules of vicarious liability may sometimes be appropriate in order better to serve Title VII's purposes. See *Kolstad* v. *American Dental Ass'n*, 527 U.S. 526, 544-546 (1999) (concluding that Restatement's rules governing employer liability for punitive damages should be modified so as to encourage employers to adopt antidiscrimination policies and to educate their personnel, thereby furthering the purposes of Title VII); *Faragher*, 524 U.S. at 802 n.3 (Court's task "is to adapt agency concepts to the practical objectives of Title VII"); *Meritor*, 477 U.S. at 72 ("common-law principles may not be transferable in all their particulars to Title VII"). But the fact that the FHA furthers the compelling public interest in preventing and redressing housing discrimination *vel non* does not suggest a congressional intent to undertake wholesale revisions of generally applicable agency and corporate law.

2. HUD's Regulations Incorporate, Rather Than Reject, Traditional Agency Principles.

a. The court of appeals relied in part (see Pet. App. 4-5, 14-15) on former 24 C.F.R. 103.20(b) (1999), which provided that administrative complaints alleging FHA violations may be filed

> against any person who directs or controls, or has the right to direct or control, the conduct of another person with respect to any aspect of the sale * * * of dwellings * * * if that other person, acting within the scope of his or her authority as employee or agent of the directing or controlling person, is engaging, has engaged, or is about to engage, in a discriminatory housing practice.

The court of appeals construed that regulation to mean that where an employee violates the Act, any person who "has the right to direct or control" that employee's conduct is

automatically subject to FHA liability. See Pet. App. 14-15. Such a rule, if it existed, would apply equally to high-level corporate officers intimately involved in all aspects of the business such as petitioner, and to lower-level supervisory employees, even though individual officers and supervisors are not ordinarily subject to vicarious liability for torts committed by others because they do not stand in a principal-agent relationship to the workers they oversee. See pp. 11-12, *supra*. The court of appeals' construction of former Section 103.20(b) is contrary to the text of the rule and to the agency's contemporaneous explanation of its own regulation.

Former Section 103.20(b) subjected a person authorized to direct or control the actions of another to potential FHA liability only "if that other person, *acting within the scope of his or her authority as employee or agent of the directing or controlling person*, is engaged, has engaged, or is about to engage, in a discriminatory housing practice." 24 C.F.R. 103.20(b) (1999) (emphasis added). The underscored language is most naturally construed to incorporate background principles of agency law—and, in particular, to indicate that one person's actual or potential control over another provides a basis for FHA liability only when a principal-agent relationship exists between the two. Cf. *Burlington*, 524 U.S. at 754 (by including "agents" within Title VII's definition of "employer," "Congress has directed federal courts to interpret Title VII based on agency principles").

The court of appeals therefore erred in construing the regulation to establish a blanket rule authorizing the filing of an administrative complaint "against any person who has the right to direct or control the conduct of another in any aspect of the sale of or provision of brokerage services to the sale of a dwelling." Pet. App. 14. The court of appeals ignored the regulation's further requirement that the person engaged in a discriminatory housing practice must have acted "as employee or agent of the directing or controlling person."

Even when a corporate officer or supervisor is authorized to direct or control the job-related conduct of a line employee, that worker ordinarily remains an "employee or agent" of the corporation itself, not of the individual officer or supervisor. Accordingly, the text of the regulation, when read as a whole, incorporates traditional agency principles.

HUD's contemporaneous explanation of the pertinent rule further clarifies the agency's intent to incorporate, not deviate from, existing agency principles. In 1988, HUD adopted the predecessor to former Section 103.20 (then codified at 24 C.F.R. 105.13) as a final regulation. See 53 Fed. Reg. 24,184, 24,185. In response to an objection to the proposed rule made by the National Association of Realtors, HUD stated that

> it is not HUD's intent to impose absolute liability on any principal; the intent * * * was to follow the law enunciated by the courts in recent Fair Housing Act cases with respect to the liability of a principal for acts of an agent. Any defenses that could be raised in court could also be raised by a respondent to a complaint filed with HUD (see discussion of § 105.18). HUD has revised the language of paragraph (b) of § 105.13 to provide that a complaint may be filed against a directing or controlling person with respect to the discriminatory acts of another only if the other person was acting within the scope of his or her authority as employee or agent of the directing or controlling person.

Id. at 24,185. Thus, in identifying the class of persons against whom administrative complaints could be filed, HUD's intent was to incorporate an existing body of judicially crafted rules, not to promulgate new and distinctive standards of vicarious liability. The 1988 preamble made clear, in particular, that the words "acting within the scope of his or her authority as employee or agent of the directing or controlling person" had been added to the final rule in

order to limit the scope of vicarious liability and to disclaim an "intent to impose absolute liability on any principal." *Ibid.*[3]

b. In 1999, after the events that gave rise to this suit, HUD issued revised regulations governing the processing of administrative complaints under the FHA. See 64 Fed. Reg. 18,538. The reference to persons exercising actual or potential direction or control was moved to 24 C.F.R. 103.202, which currently states:

> **Notification of respondent; joinder of additional or substitute respondents.**
>
> (a) Within ten days of the filing of a complaint * * *, the Assistant Secretary will serve a notice on each respondent by certified mail or by personal service. A person who is not named as a respondent in a complaint, but who is identified in the course of the investigation

[3] In expressing an intent "to follow the law enunciated by the courts in recent Fair Housing Act cases with respect to the liability of a principal for acts of an agent" (53 Fed. Reg. at 24,185), HUD apparently referred to the decisions in *United States* v. *Youritan Construction Co.*, 370 F. Supp. 643, 649 (N.D. Cal. 1973), modified as [to] relief and affirmed, 509 F.2d 623 (9th Cir. 1975); *Northside Realty Assocs.* v. *United States*, 605 F.2d 1348, 1353 n.9 (5th Cir. 1979); *Marr* v. *Rife*, 503 F.2d 735, 740-742 (6th Cir. 1974); *United States* v. *Northside Realty Assocs.*, 474 F.2d 1164, 1168 (5th Cir. 1973); *Moore* v. *Townsend*, 525 F.2d 482, 485 (7th Cir. 1975); *Johnson* v. *Jerry Pals Real Estate*, 485 F.2d 528, 531 (7th Cir. 1973); *Dillon* v. *AFBIC Dev. Corp.*, 420 F. Supp. 572, 579 (S.D. Ala. 1976); and *United States* v. *Real Estate Dev. Corp.*, 347 F. Supp. 776, 785 (N.D. Miss. 1972). See 49 Fed. Reg. 40,529 (1984) (notice of proposed rulemaking) (citing cases). Although each of those cases recognizes that principles of vicarious liability apply to suits under the FHA, the decisions taken together cannot be said to reflect a judicial consensus regarding the precise application of those principles. Several of the cases deal with the liability of the corporate employer rather than of individual officers or supervisors. None holds in terms that background rules of agency should be disregarded in adjudicating claims under the FHA.

> * * * as a person who is alleged to be engaged, to have engaged, or to be about to engage in the discriminatory housing practice upon which the complaint is based may be joined as an additional or substitute respondent by service of a notice on the person under this section within ten days of the identification.
>
> (b) The Assistant Secretary will also serve notice on any person who directs or controls, or who has the right to direct or control, the conduct of another person who is involved in a fair housing complaint.

24 C.F.R. 103.202; see 64 Fed. Reg. at 18,541.[4]

Although current Section 103.202 is not limited by its terms to situations in which a subordinate has "act[ed] within the scope of his or her authority as employee or agent of the directing or controlling person" (and is therefore, if anything, broader than the previous regulation on which the court of appeals relied), the 1999 regulatory amendment was not intended to expand liability or effect a departure from background agency principles. First, HUD made clear at the time of the revision that its intent was to rewrite the pertinent regulations "using plain language" (64 Fed. Reg. at 18,538), and that the new "rule does not make substantive changes to the regulations. All procedures and requirements for filing housing discrimination complaints remain as they are currently." *Id.* at 18,539.

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[4] In the petition for certiorari (at 9-10), petitioner chided the court of appeals for relying on the superseded former 24 C.F.R. 103.20(b). In their brief in opposition (at 11 n.2), respondents pointed out that the "direct or control" language previously contained in former Section 103.20(b) has been moved to a different regulatory subsection rather than eliminated altogether. Petitioner nevertheless continues to assert (Br. 20) that the 1999 regulatory amendment "completely abolish[ed] any reference to liability of 'any person' with 'the right to direct or control the conduct of another person' with respect to housing as subject to a claim."

Second, HUD's regulations continue to provide (albeit in a different regulatory subsection than before the 1999 amendments) that "[t]he respondent may assert any defense that might be available to a defend[a]nt in a court of law." 24 C.F.R. 103.203(a). That would include a defense that the person sued has committed no violation of the Act and bears no indirect liability for anyone else's violation.

Third, current Section 103.202(b) does not say that "any person who * * * has the right to direct or control, the conduct of another person," will automatically be liable for the other person's FHA violations. Rather, it provides that where an individual is alleged to violate the FHA, "[t]he Assistant Secretary will also serve notice" of the complaint on any person authorized to direct and control the alleged violator. 24 C.F.R. 103.202(b). The rule thus identifies a broad class of persons who may be *potentially* liable under the Act, and are therefore entitled to receive notice of a pending proceeding, rather than articulating a test for determining *actual* liability.[5]

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[5] Requiring that notice of a complaint be served on a broad class of persons makes particular sense in light of the purposes of the administrative complaint procedure. This Court has described the complaint procedure under the FHA as "a simple, inexpensive, informal conciliation procedure, to be followed by litigation should conciliation efforts fail." *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 104 (1979); see 53 Fed. Reg. at 24,184 (administrative complaint procedures are used "to make a determination to resolve matters raised in complaints and to try to eliminate and correct alleged discriminatory housing practices by informal means"). Thus, at least in many instances, the point of the administrative complaint mechanism is not so much to assign blame for past violations as to devise pragmatic strategies to ensure compliance with the Act on a prospective basis. For that purpose it makes particularly good sense to provide notice in the administrative process to persons (such as supervisors and individual corporate officers) who are authorized to direct and control the actual violator, even when their relationship to the violator may not give rise to vicarious liability for prior wrongs.

c. HUD's regulatory approach is entitled to deference under the principles announced in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-845 (1984). HUD is charged by Congress with the administration and enforcement of the FHA, and the Secretary of HUD is responsible for promulgating regulations to carry out the purposes of the Act. See 42 U.S.C. 3608, 3612, 3614a. Perhaps the agency could permissibly have determined, with respect to the scope of vicarious liability under the FHA, that significant departures from background agency and corporate law principles were warranted. But, in the absence of statutory language addressing the question, HUD's decision to incorporate generally applicable rules of vicarious liability was surely reasonable. Cf. *Edelman* v. *Lynchburg College*, 122 S. Ct. 1145, 1151-1152 (2002) (Equal Employment Opportunity Commission acted reasonably in adopting "relation back" rule that was consistent with traditional practice).

II. FURTHER PROCEEDINGS ARE WARRANTED TO DETERMINE WHETHER PETITIONER IS SUBJECT TO PERSONAL LIABILITY UNDER CORPORATE VEIL-PIERCING PRINCIPLES

For the reasons stated above, the court of appeals erred in construing the FHA and implementing regulations to establish a distinctively broad rule of vicarious liability. Nevertheless, the court of appeals' *judgment*, which reversed the district court's dismissal of respondents' claims and remanded the case for further proceedings, should be affirmed. Even under general principles of agency and corporate law, respondents may be able to establish petitioner's personal liability for Crank's alleged unlawful conduct. Accordingly, a remand is appropriate to consider petitioner's liability, not under a distinct, FHA-specific rule of vicarious liability, but under traditional principles of agency and corporate law.

A. The general rule that corporate stockholders are not personally liable for wrongs committed by the corporation's

employees (see p. 12, *supra*) is subject to well-recognized exceptions. Thus, under established corporate law principles, "the corporate veil may be pierced and the shareholder held liable for the corporation's conduct when, *inter alia*, the corporate form would otherwise be misused to accomplish certain wrongful purposes." *Bestfoods*, 524 U.S. at 62; accord, *e.g.*, *First Nat'l City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 630 (1983) (Court "has consistently refused to give effect to the corporate form where it is interposed to defeat legislative policies"). As with the statute at issue in *Bestfoods*, "[n]othing in [the FHA] purports to rewrite this well-settled rule." *Bestfoods*, 524 U.S. at 63. "[T]he failure of the statute to speak to a matter as fundamental as the liability implications of corporate ownership demands application of the rule that in order to abrogate a common-law principle, the statute must speak directly to the question addressed by the common law." *Ibid.* (brackets and internal quotation marks omitted). Thus, if respondents can establish the prerequisites for piercing the corporate veil, petitioner may be held personally liable for Crank's alleged FHA violations.

"The alter ego doctrine states that, when the corporation is the mere instrumentality or business conduit of another corporation or person, the corporate form may be disregarded." 1 *Fletcher Cyclopedia*, *supra*, § 41.10, at 568; see *Chicago, Milwaukee & St. Paul Ry.* v. *Minneapolis Civic & Commerce Ass'n*, 247 U.S. 490, 500-501 (1918) (rule that one corporation's ownership of stock in another does not generally "create the relation of principal and agent or representative between the two" is inapplicable "where stock ownership has been resorted to * * * for the purpose * * * of controlling a subsidiary company so that it may be used as a mere agency or instrumentality of the owning company or companies"). As the Tenth Circuit has explained,

> the federal common law doctrine of piercing the corporate veil under an alter ego theory can best be described by the following two-part test: (i) was there such unity of interest and lack of respect given to the separate identity of the corporation by its shareholders that the personalities and assets of the corporation and the individual are indistinct, and (ii) would adherence to the corporate fiction sanction a fraud, promote injustice, or lead to an evasion of legal obligations.

NLRB v. *Greater Kansas City Roofing*, 2 F.3d 1047, 1052 (10th Cir. 1993); accord 1 *Fletcher Cyclopedia*, *supra*, § 41.30, at 619.

B. Based on the allegations in respondents' complaint and the evidence adduced to this point, petitioner is potentially subject to FHA liability under established veil-piercing principles.[6]

1. Respondents may be able to establish the requisite "unity of interest" between petitioner and Triad. Respondents' complaint alleged that "[a]t all times relevant herein, the Triad real estate firm was owned and operated by [petitioner], who served and continues to serve [as] its president and designated officer/broker." J.A. 7. Although petitioner claims to have transferred ownership of the corporation to Crank in 1995, the court of appeals found that a genuine

[6] Petitioner asserts that respondents "have made no claim that the corporate veil should be pierced, nor did they offer any evidence to support such a claim." Pet. Br. 19. That is incorrect. In arguing that petitioner was potentially liable under the FHA in his capacity as sole shareholder of Triad (Resp. C.A. Br. 45-46, 56-59), respondents asserted that their "evidence would show that [petitioner] is the *sole* shareholder of Triad, and thus an argument to pierce the corporate veil would be meritorious." *Id.* at 59 n.17. And for the reasons stated below, the allegations of respondents' complaint and the evidence adduced to date provide sufficient support for a veil-piercing theory to permit this suit to go forward.

factual dispute existed on that point. Pet. App. 9-10 n.4. It appears to be undisputed that petitioner continued to serve as the president of Triad, and as the corporation's designated officer/broker, at the time of the discriminatory conduct alleged in this case.

"[T]he mere fact that all or almost all of the corporate stock is owned by one individual or a few individuals will not afford sufficient grounds for disregarding corporateness." 1 *Fletcher Cyclopedia*, *supra*, § 41.35, at 665-666. Nonetheless, a plaintiff can more readily establish a basic identity of interests between the shareholder and the corporation where ownership is concentrated in a single individual. See, *e.g.*, Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability & the Corporation*, 52 U. Chi. L. Rev. 89, 109-110 (1985) (stating that "[a]lmost every case in which a court has allowed creditors to reach the assets of shareholders has involved a close corporation," and explaining that while sole ownership of a corporation does not in itself warrant piercing the corporate veil, the economic reasons for limited liability for close corporate shareholders are significantly weakened). "When substantial ownership of all the stock of a corporation in a single individual is combined with other factors clearly supporting disregard of the corporate fiction on grounds of equity and fairness, courts have been willing to apply the 'alter ego' or instrumentality theory in order to cast aside the corporate shield and to fasten liability on the individual shareholder." 1 *Fletcher Cyclopedia*, *supra*, § 41.35, at 666-668. And if petitioner is ultimately found to have been Triad's sole shareholder at the time of the alleged violation, his status as Triad's president and designated officer/broker will reinforce the inference that he exercised pervasive control over the corporation's affairs.[7]

[7] The court of appeals suggested that petitioner's status as sole shareholder of Triad would, if proved, be sufficient in and of itself to subject petitioner to personal liability for FHA violations committed by

b. Respondents may also be able to demonstrate that petitioner failed to observe corporate formalities. "In order to avoid the potential for a court to pierce the corporate veil, a corporation must be sure to observe corporate formalities." 1 *Fletcher Cyclopedia*, *supra*, § 41.31, at 635. Petitioner has admitted that between April 1995 and August of 1998, he did not review any Triad paperwork regarding finalized real estate transactions—a clear failure to comply with corporate formalities and state law real estate requirements. C.A. E.R. 70, 207. Respondents have also alleged that "Triad pays its taxes under [petitioner's] identification number" (Pet. App. 10 n.4), an allegation that if proved would indicate that petitioner has failed to treat Triad as a distinct legal entity.

c. Respondents may also be able to establish that adherence to the general rule of limited shareholder liability would produce inequitable results here. In a declaratory judgment action brought by Triad's insurer, the district court held that Triad's insurance policy specifically excluded claims of discrimination in the provision of services. C.A. E.R. 245-259; see Pet. App. 19, 31. Triad itself appears to be without assets. See 02/02/99 Tr. 30, 39. Unless petitioner is subject to personal liability, therefore, respondents may be unable to obtain redress for their injuries even if they prove

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subordinate employees. See Pet. App. 7-11. The Seventh Circuit appears to have reached a similar conclusion. See *City of Chicago* v. *Matchmaker Real Estate Sales Ctr., Inc.*, 982 F.2d 1086, 1098 (7th Cir.) ("where common ownership and management exists, corporate formalities must not be rigidly adhered to when inquiry is made of civil rights violations"), cert. denied, 508 U.S. 972 (1993); cf. *ibid.* (stressing sole shareholder's pervasive involvement in corporation). Essentially for the reasons stated at pp. 13-22, *supra*, that conclusion is erroneous. Neither the FHA nor HUD's implementing regulations suggest that a distinct, unusually broad rule of veil-piercing applies to claims brought under the Act. Under established principles, petitioner's alleged status as sole shareholder is relevant to, but does not obviate the need for, an analysis of whether to pierce the corporate veil.

a violation of the FHA. Although the insolvency of the corporation does not by itself warrant the imposition of personal liability on the shareholder, inadequate capitalization is another relevant factor in determining whether the corporate veil should be pierced. See, *e.g.*, *Anderson* v. *Abbott*, 321 U.S. 349, 362 (1944) ("An obvious inadequacy of capital, measured by the nature and magnitude of the corporate undertaking, has frequently been an important factor in cases denying stockholders their defense of limited liability.").[8]

Finally, in determining whether adherence to the general rule of limited liability will produce an unjust result, courts will consider whether the individual shareholder bears some personal responsibility for the breach with which the corporation is charged. See *Greater Kansas City Roofing*, 2 F.3d at 1053 ("the individual who is sought to be charged personally with corporate liability must have shared in the moral culpability or injustice"). In the present case, petitioner in his role as designated officer/broker is alleged to have acted negligently in his training and supervision of Triad employees. That alleged dereliction may have been causally linked to the FHA violation for which respondents seek redress, and it constitutes a breach of the terms under which Triad was permitted to employ the corporate form in its conduct of real estate transactions. Petitioner's negligent performance of his corporate responsibilities, if proved, would further support a determination that piercing of the

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[8] As one leading treatise explains,

> [i]f a corporation is organized and carries on a business without substantial capital and is likely to have insufficient assets available to meet its debts, it is inequitable to allow the shareholders to escape personal liability. The attempt to do corporate business without providing any sufficient basis of financial responsibilities to creditors is an abuse of the separate entity and will be ineffectual to protect shareholders from corporate debts.

1 *Fletcher Cyclopedia*, *supra*, § 41.33, at 648-649 (footnotes omitted).

corporate veil is appropriate to prevent an inequitable result.

d. In *Bestfoods*, this Court noted, but did not resolve, a circuit conflict on the question whether, in resolving claims under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.*, "courts should borrow state law, or instead apply a federal common law of veil piercing." 524 U.S. at 63 n.9. Although the FHA does not specify whether state or federal common law veil-piercing standards should apply, a uniform federal standard is appropriate. Cf. *Clearfield Trust Co.* v. *United States*, 318 U.S. 363, 366-367 (1943) (federal courts should establish uniform federal rules of decision when a federal statute is silent as to choice of law and overriding federal interests exist). Unlike (for example) the "custom-made, hand-tailored, specifically negotiated" government loan at issue in *United States* v. *Yazell*, 382 U.S. 341 (1966), the FHA is a "nationwide act of the Federal Government, emanating in a single form from a single source." *Id.* at 348.

The question whether the corporate veil should be pierced in this case is one of derivative liability: the effect of veil-piercing would be to treat petitioner as Crank's principal, so that Crank's alleged discriminatory conduct would be imputed to petitioner. In resolving issues of vicarious liability under Title VII, see *Burlington*, *supra*; *Faragher*, *supra*, this Court did not suggest that the liability of an employer for wrongs committed by the company's employees could turn on state-by-state variations in the law of agency. Rather, the clear import of the Court's decisions is that such questions should be resolved through the application of uniform federal rules. The same approach is appropriate here.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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